In the Forefront

Arbitration

JAMES E. LUDLAM, ESQ., *Los Angeles*, AND HOWARD HASSARD, ESQ., *San Francisco*

FOR TWO YEARS a group of Southern California hospitals and attending physicians has been involved in an experimental program intended to explore arbitration as an alternative to court litigation of claims, including malpractice claims.

Because of the nature of such claims, considerable time must elapse from the inception of the program before a valid body of experience can develop. However, due to widespread interest in the demonstration project, this article has been prepared to report events thus far and to explain the project and goals it is designed to achieve. In its final design the project incorporated the thinking of nearly 100 persons and organizations.

Unique to this project is the inclusion of the agreement to arbitrate in the Conditions of Admission form signed by the patient at the time of admission to the hospital. As will be shown later, a legal question of basic importance to arbitration is involved. The idea came to one of the authors (J.E.L.) following a meeting of the California Hospital Association's group professional liability program. One of the principal issues discussed was the long delay in determining actual losses for any claims year. The fact that an insurance company may be collecting premiums based on current dollars and paying judgments inflated by the passage of time many years later has been a major deterrent to additional carriers who might otherwise enter the field. Concern about the high costs of professional liability insurance also has made the idea of arbitration seem attractive.

Before practical questions could be faced, the basic legal issues had to be resolved. The first issue was whether a form of agreement that would be mutually binding upon the patient on the one hand and the hospital and attending physician on the other could be developed.

There is a legal doctrine called "adhesion" which holds that an agreement executed when one party is placed in an ineffective bargaining position may not be binding upon that party if the court finds any element of unfairness or overreaching by the party who originally prepared the agreement. The doctrine of adhesion would appear to apply to any statement signed by a patient at a hospital. The California Supreme Court has stated this succinctly: "The admission room of a hospital contains no bargaining table . . ."—Tunkl v. Regents of University of California, 60 Cal. 2d 92 (1963).

Since the Tunkl case involved a paragraph in the Conditions of Admission form that required the patient to waive any right to claim negligence against the hospital, the question of bargaining power and fairness was a critical issue in the court's decision. It is apparent that a court will examine carefully the fairness of any agreement to arbitrate executed by a person who is given the alternative of signing it or not being admitted to the hospital.

On the other hand, courts view the use of arbitration as an alternative method of settling a legal dispute as good public policy. The California Supreme Court case of Doyle v. Giuliucci, 62 Cal. 2d 606 (1965), involving a challenge to an arbitration clause contained in a subscriber agreement of the health insurance program of the Ross-Loos medical group,* is particularly important. In this

Mr. Ludlam is legal counsel for the California Hospital Association and the Hospital Council of Southern California. Mr. Hassard is general counsel for the California Medical Association and legal counsel for the National Association of Blue Shield Plans and the California Blue Shield Plan.

Reprint requests to: California Medical Association, 693 Sutter St., San Francisco, Ca. 94102 (Mr. J. E. Curley, Jr.).

*The Ross-Loos medical group is a closed panel medical insurance program similar to the Kaiser-Permanente Plan except that it is not hospital-based.

case, the claimant was a minor who enjoyed dependent coverage under his father's policy. The California Supreme Court not only bound the child to the contract executed by his parent, but also approved of the use of arbitration for settling such a dispute by stating: "The arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for settlement of disputes." Although the situation of an applicant for health insurance differs somewhat from that of a patient in the admission room, the Ross-Loos case did satisfy the public policy question as to the use of arbitration.

Solving Adhesion

To solve the adhesion problem a two-step approach that is not only fair and equitable but also should be legally binding was used. First, the patient is given the right to delete the arbitration clause in the Conditions of Admission form simply by placing his initials in a box directly beneath the arbitration clause. Admission clerks are instructed to accept such deletion without question, so the element of compulsion is eliminated. Second, the patient can delete the arbitration clause by written notification within 30 days after his discharge. California procedure specifies that the patient or his representative be given a copy of the signed Conditions of Admission form. If for any reason the patient merely scanned the form or did not understand it fully, he has a reasonable time to study his copy. If he then fails to repudiate it, he is bound by its terms. The period of 30 days was considered a fair and adequate time for the patient to study his copy of the Conditions of Admission Agreement.

After these basic issues were resolved, legal counsel for the California Hospital Association (CHA) then contacted the California Medical Association (CMA) and the principal insurance carriers for physicians and hospitals in the area to obtain their reactions, questions, and suggestions. The project was now officially a joint undertaking of CHA and CMA. A preliminary decision was made to use the American Arbitration Association (AAA) as an impartial body to administer the program. Several possible arbitration procedures exist under California law. The most common procedure specifies that each party select an arbitrator; if the arbitrators cannot agree, they select a third whose decision is binding. This too much resembled a negotiated settlement. The American Arbitration Association system was chosen because it is designed to reach a clear-cut decision of right or wrong.

DISCOVERY

In November, 1970, a proposal to give the same rights to discovery in an arbitration proceeding involving personal injury as in court became effective under California law. Discovery is the exchange of information by the involved parties before the hearing or trial, making use of procedures defined by statute. Discovery is based on the theory that a lawsuit should be a "search for the truth" and "not a game" to be fought and won mainly by strategic moves and surprise tactics. Attempts to thwart discovery are subject to perjury penalties. Included in discovery are rights to depositions, mental and physical examinations, examination of records and "things."

The AAA arbitration process differs in certain important details from the standard form of arbitration established by state laws. Under AAA procedures the arbitration process is initiated with the filing of a written demand for arbitration with the local office of the AAA. At this point the AAA staff member assumes complete responsibility for the administration of the case, including assisting both sides in procedural matters, until the award is rendered. Upon receipt of the demand for arbitration, the local AAA administrator sends identical lists containing the names of technically qualified arbitrators to both sides, who then have a period of seven days in which to object to any of the arbitrators on the list and to number the remaining ones in order of preference. The lists are matched to make the final selection; if there is no matching, an additional list is submitted to both sides. The hearing is conducted in a manner somewhat similar to that of a court hearing, but with a degree of informality that expedites the process. The arbitrators are not required to follow strict rules of evidence, but may hear all evidence that has a bearing on the controversy. A decision must be made within 30 days of the conclusion of the hearing. Except in extraordinary circumstances, the decision is final.

Even when there has been previous agreement to arbitrate, the use of arbitration is not mandatory unless one of the parties elects to initiate the arbitration process, at which time it does become binding. It was recognized that some cases can be handled more appropriately in the courts than in arbitration. Moreover, only those physicians who have agreed in writing to arbitrate are bound, and no consulting physician can initiate arbitration without the participation of the admitting physician. If a physician's insurance carrier refused to cooperate, the case will be tried separately in a court of law.

The principal insurance carriers for most of the physicians and hospitals who requested participation in the project cooperated fully. Without their approval, there would have been serious question whether the use of an arbitration clause by a physician or a hospital would trigger the noncooperation clause in the insurance policy.

The Demonstration Project

The demonstration project is limited to nine hospitals in a restricted geographic area. Originally eight hospitals introduced a new Conditions of Admission form containing an arbitration clause on July 1, 1969. They were California Hospital, Los Angeles; Daniel Freeman Memorial Hospital, Inglewood; Garfield Hospital, Monterey Park; Holy Cross Hospital, San Fernando; Hospital of the Good Samaritan, Los Angeles; Long Beach Community Hospital, Long Beach; Memorial Hospital of Glendale, Glendale; and South Bay Hospital, Redondo Beach. On July 1, 1970, St. Joseph Hospital, Orange, and Children's Hospital of Orange County, Orange, joined the pilot project. On February 9, 1971, Holy Cross Hospital closed due to severe earthquake damage.

For each hospital, participation was approved by the governing board, the executive medical board, the insurance carrier for the hospital, the insurance carriers for the majority of the physicians on the staff, by a substantial majority of the members of the active medical staff, and by a joint committee of the California Hospital Association and the California Medical Association.

The open sessions at which the project was explained to the hospital medical staffs were most stimulating, and as a result a number of constructive changes were made. Of great importance to the physicians was the fact that the decision of a hospital to participate in the project did not bind individual members of the medical staff to participation. Each physician received a card on which he indicated his decision to participate or not to participate. Physicians responsible for the admission of 80 percent of the patients in the demonstration hospitals elected to participate in the plan, and the figure has risen to more then 90 percent in most of the hospitals.

Goals of Arbitration

Presentations to medical staffs stressed the goals of the arbitration project:

- To speed the handling of claims so that they can be disposed of in months rather than years.
- To reduce substantially the time a physician must spend in litigation.
- To save the time of physicians, witnesses, and lawyers.
- To ensure a high degree of sophistication in the decision-making process.
- To minimize unnecessary appeals because of the recognized finality of an arbitration award.
- To limit publicity because of the confidential nature of the arbitration process as contrasted with the flamboyant aspects of many jury trials.
- To limit the amount of judgments, which otherwise may be too large because of emotional and theatrical appeals to a jury.

Progress

Twelve months after initiation of the program in the original eight institutions, a progress meeting was held with representatives of the participating hospitals. In the first 12 months, only about 50 persons of the more than 70,000 admitted to the hospitals chose to reject arbitration, including three who did so by written notice during the 30-day period after discharge.

At that time, no suits or requests for arbitration had been received. This was not surprising, because claims or suits generally follow in from six to twelve months after the patient's admission at the very earliest. All participating hospitals expressed a desire to continue in the project and indicated widespread support from members of their medical staffs.

Through December of 1970 there had been 124,758 admissions under the project and 116 rejections of the arbitration option, of which 113 were made in the hospital and three by written

notice after the patients left the hospital. There were still no suits filed as of that date.

This project is but one of a series of major programs designed to allay the increasing costs of professional liability insurance. The California Hospital Association and the California Medical Association will continue to stress prevention of conditions giving rise to causes of action and will work for legislation that will restore reasonable protection to defendant physicians and hospitals from unlimited extension of the doctrine of res ipsa loquitur and from an ineffective statute of limitations.

Copies of the Hospital Arbitration Regulations developed in cooperation with the American Arbitration Association are available from James E. Ludlam, Musick, Peeler & Garrett, One Wilshire Boulevard, Los Angeles, California, 90017.

"PRE-HERNIA" IN PRE-EMPLOYMENT EXAMINATION

Do you recognize an incipient or industrial hernia on pre-employment examination?

"I think that the so-called 'pre-hernia' is one of the most annoying things we face. I have what I might call minimum standards, that is, either it is a hernia or it isn't. In my way of looking at it, a hernia is an abnormal protrusion of a viscus through an aperture in the body parietes. Some patients have a large dilated ring; they have a rotund abdomen; and if you get your finger through the ring, you can palpate the floor of Hesselbach's triangle. That, in my opinion, is not a hernia, and I don't recommend repair of it. Furthermore I don't make a diagnosis of pre-hernia because once you use the word hernia in the presence of a patient or in one of those industrial cases you've had it. The patient becomes totally incapacitated. Yet we know that a small direct inguinal hernia is a very insignificant threat. So I have my minimum standards. If it doesn't come through the external ring, I do not call it a hernia; and in my practice I do not recognize the so-called pre-hernia."

—Joseph L. Ponka, M.D., Detroit

Extracted from *Audio-Digest Surgery*, Vol. 16, No. 18, in the Audio-Digest Foundation's subscription series of tape-recorded programs. For subscription information: 619 S. Westlake Ave., Los Angeles, Ca. 90057.